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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Working paper on the question of the ownership and control of the cultural property of indigenous peoples prepared by Ms. Erica-Irene Daes

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INTRODUCTION

1. By its resolution 1990/25, the Subcommission on Prevention of Discrimination and Protection of Minorities entrusted the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, with the preparation of a working paper on the question of the ownership and control of the cultural property of indigenous peoples. In the resolution reference is made to the continuing destruction and confiscation of indigenous peoples' skeletal remains, burial artifacts and other objects of religious and cultural significance and to the anguish caused by the denial of ownership and control of these items. The resolution also notes certain instances of voluntary return of indigenous remains, and of action taken by UNESCO. It should also be recalled that the first revised text of the draft universal declaration on indigenous rights (see E/CN.4/Sub.2/1990/42, annex II) makes reference to various aspects of cultural rights particularly in draft operative paragraphs 5, 6 and 8.

I. SCOPE OF CONCERN

2. The purpose of this working paper is to propose a tentative framework which might guide any further elaboration and study. If the Sub-Commission wishes to study the subject, it may consider two main aspects: (a) return and restitution of cultural property of indigenous peoples; (b) protection and preservation of existing cultural property of indigenous peoples including their human or skeletal remains, folklore, crafts and skills. Any examination of the last-mentioned may be less difficult, in particular as international efforts seeking the protection of cultural property has resulted in many international norms and practices which can be analysed in regard to the cultural property of indigenous peoples. The standard-setting work of the Working Group on Indigenous Populations may also provide relevant norms or principles in this field. The first aspect, however, is a very complex one, and any consideration of cultural property concerning indigenous peoples and the return of such property to them will raise a variety of historical, political, legal, and moral questions, some of which are of a delicate and legally complicated nature.

3. As the present discussion in this area has not yet resulted in internationally accepted norms or standards, the study, if undertaken, should not be considered exhaustive. However, the study might approach these issues by confining itself, at the outset, to the particular concerns of indigenous peoples which have not yet been fully addressed at the international level. The study may examine the question as part of the wider efforts of the United Nations to promote the human rights and fundamental freedoms of indigenous peoples and the importance of cultural property which may be of fundamental spritual, religious, and cultural value to them as part of their cultural heritage and identity.

4. The working paper may try to define cultural property as it concerns indigenous peoples based on existing definitions in international and regional instruments. Cultural property is defined by the principal international instrument dealing with cultural property, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property 1/ adopted by the General Conference at its sixteenth session on 14 November 1970, as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science". Article 1 of the Convention lists the following categories:

> "(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
>
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
>
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaelogical sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments."

5. The Convention Concerning the Protection of the World Cultural and Natural Heritage 2/ adopted by the General Conference of UNESCO on 16 November 1972 defines cultural heritage, inter alia, as works of man or the combined works of nature and of man, and areas including archeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view. The Convention broadens the definition of cultural property contained in the 1970 UNESCO Convention by its inclusion of sites of outstanding universal value as part of the cultural heritage of States parties. However, the definitions make no reference to spiritual or religious criteria that might apply in identifying such areas.

6. While such definitions must be a guide for the purposes of the study, they by no means fully reflect the concerns of indigenous peoples nor do they necessarily provide comprehensive coverage of cultural property as defined by these communities. Indigenous peoples have themselves indicated the importance of individual artistic works, artifacts and handicrafts; objects of religious significance; music, folklore and design; archaeology and human remains; and sacred and historical sites. But even this list may not be comprehensive and further consultation with indigenous peoples would be necessary to ensure that their proper concerns are reflected.

7. Any definition of the cultural property of indigenous peoples will also need to take account of the specificity of their cultures. To give an example, the UNESCO Convention places importance on the antiquity of cultural property. There is no direct reference to human or skeletal remains except in so far as they are "products of archaeological excavations" or "discoveries". Indigenous peoples when demanding the return of skeletal and human remains, however, are not doing so exclusively because they are important for their own "archaeology, prehistory or history", but because the ancestors are a living part of their present-day society. To have one's ancestors be the subject of curious museum visitors rather than interred in the territories of their origin is undignified, sacriligious, and denies the present generation vital contact with those preceding. One indigenous representative has stated, "If you disturb the deceased or rob from them, it not only disturbs the spirit but can bring harm to the living".

8. Indigenous cultural property also may include oral history, referred to by the UNESCO Convention as "sound, photographic and cinematographic archives". While the term "archive" suggests material knowledge that is no longer in use and of historical interest only, photographs, film and sound recordings of certain indigenous peoples in the hands of outsiders may be perceived as violations of active religious beliefs and culture. The secret filming of traditional Hopi ceremonies by non-indigenous film-makers is a case in point. An example of another approach is the recordings of songs, rituals and folklore of the Aranda people in Central Australia made by the archaeologist Strehlow in the 1930s. 3/ Aranda elders entrusted Strehlow with knowledge of rituals, some of it secret, because they feared it would be lost with encroaching modernization. Such knowledge is a vital part of contemporary Aboriginal culture. In other words, the notion of indigenous cultural property will need to include an understanding that the spiritual or cultural importance of a particular cultural object may override commercial or strictly property considerations. A comprehensive understanding of the meaning of the cultural property of indigenous peoples is a prerequisite for a future study of this subject.

II. HISTORICAL LOSS OF INDIGENOUS CULTURAL HERITAGE

9. The study of the Cultural property of indigenous peoples must necessarily consider the circumstances in which objects of cultural or religious importance left the community. As indigenous populations are, in part, defined as the descendants of peoples whose former territories were conquered, settled or incorporated in some other way by peoples of a different culture or ethnic origin, the colonial context for the loss of indigenous cultural heritage will need to be acknowledged. It is certain, of course, that some cultural objects were given to outsiders by indigenous peoples either as an exchange or as a gift, but many, perhaps most, objects were stolen by the colonizing powers and are now part of private or public collections. It would not be an exaggeration to say that, historically, indigenous cultural patrimony was considered by the colonizing forces as the legitimate booty of war and conquest. Consequently, the very best examples of indigenous cultural products may be found in museums and private collections in the former colonizing countries or on the international antiquities market. This leaves many indigenous communities without samples of their culture to teach their children and grandchildren the history of their people.

10. Furthermore, the authorities, in their efforts to establish control over indigenous territories and in order to assimilate the native population, in certain cases also systematically and deliberately destroyed religious or cultural objects and sites. This denigration of indigenous culture has extended even into this century when sites or objects of symbolic and spiritual importance to indigenous peoples have been destroyed or exposed to tourists for commercial gain.

11. Of particular significance to indigenous peoples are the skeletal and human remains which are held by museums, universities, medical schools and other institutions. It should be remembered that certain anthropologists, scientists and other scholars, particularly during the nineteenth century, were advancing theories about human development which explained the dominance of Europeans over other peoples. These discredited racist theories, in part, drew upon the vast collection of human remains taken from indigenous graves and burial sites. Indeed, the pseudo-scientific investigations of such scholars were seen as justifying the desecration of these religious sanctuaries. Today, as a consequence, countless skeletal remains are still housed or on display in museums and other institutions around the world.

12. On the other hand, in some cases the collection of indigenous cultural property was often motivated by real cultural respect coupled with genuine scientific interest and anthropological esteem. Acquisition of these objects was stimulated by a desire to preserve their beauty, in recognition of their unique cultural value, and to make them known and accessible to a wide public. Furthermore, indigenous cultural property often served as the inspiration for European artists of the nineteenth and twentieth centuries.

III. LEGAL FRAMEWORK

13. The Subcommission has given a mandate to examine the question of the ownership and control of the cultural property of indigenous peoples, and it is not the aim of the working paper to go beyond these strict limits. However, some reference will be necessary to existing international and regional instruments, relevant national legislation and other arrangements dealing with cultural property. Furthermore, a range of questions will need to be raised in connection with the ownership and control of indigenous cultural property. Consideration will have to be given to the manner in which indigenous cultural property left the community. The present ownership of these items will also need to be considered, particularly as certain indigenous cultural products were obtained in good faith. It may also be important to take into account the length of time which these objects have been in the hands of their current owners, as well as the legitimate scientific and educational objectives of the museums and other institutions which might be in possession of them. These questions, among others, have been studied in detail by UNESCO and other bodies and any future study would need to draw upon the knowledge and precedents they have established.

14. Furthermore, contemporary national law in general and relevant international instruments have been developed without reference to indigenous legal practices and law. In most indigenous societies cultural property is owned by the community as a whole and not by a single individual. It may be that one person or family is the holder or trustee of an object, particularly if the object is of great religious or historic importance, but he or she may not, according to indigenous law, dispose of it. Thus, any further study would necessarily have to consider indigenous property relations.

A. International instruments

15. The protection and restitution of cultural property has a long history. For centuries, warring States considered that the victorious armies had the right to plunder but that certain objects or sites of cultural importance should be protected. During the American Civil War, the General Orders Affecting the United States Volunteer Force promulgated by the War Department, the Lieber Code, 4/ made one of the first attempts to provide some protection to cultural property during wartime. Following the Second World War a number of agreements were reached concerning the protection of cultural property. Mention should be made in particular to The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict; the Regulations for the Execution of The Hague Convention of 14 May 1954, for the Protection of Cultural Property in the Event of Armed Conflict; the Protocol of The Hague of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict; Resolutions of the Intergovernmental Conference of The Hague on the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954. 5/

16. The recent international instruments governing cultural property have sought to balance two viewpoints: the notion of "cultural patrimony" and that of the "common heritage of mankind". On the one hand, States which have been deprived of or are losing in one way or another objects of cultural importance

wish to protect and regain them; on the other hand, States holding large collections of cultural objects argue that they are of universal value, should be available for legitmate scientific research and for educational purposes, and need responsible conservation.

17. The 1970 UNESCO Convention referred to above 6/ is the principal international instrument dealing with cultural property. However, as its title suggests, the Convention is limited to regulating the illicit acquisition of and trafficking in cultural property. Its aim is not the restitution of cultural property removed during colonial or foreign rule to the country of origin, but control of the illicit art trade. General Assembly resolutions 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975, 32/18 of 11 November 1977, 31/40 of 30 November 1976, 32/18 of 11 November 1977, 33/50 of 14 December 1978, 34/64 of 29 November 1979, 35/127 and 35/128 of 11 December 1980, 36/64 of 27 November 1981, 38/34 of 25 November 1983, 40/19 of 21 November 1985, 42/7 of 22 October 1987, and 44/18 of 6 November 1989 deal more directly with the protection and restitution of cultural property.

18. The notion of cultural patrimony is further developed in 1972 UNESCO Convention 7/ which protects items pertaining to the cultural or natural heritage that are of outstanding universal value from the point of view of history, art, science or aesthetics. It recognizes the duty of the international community to cooperate in ensuring the conservation of a heritage which is of universal character. Although not explicitly referring to indigenous cultural patrimony, the inventory of property forming part of the cultural and natural heritage which has been drawn up by the World Heritage Committee, as envisaged by the Convention, includes sites of cultural, historic or religious importance to indigenous peoples.

19. In connection with the protection of folklore, UNESCO and the World Intellectual Property Organization drafted Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions 8/ in 1985. The provisions recognize that expressions of folklore constitute manifestations of intellectual creativity and deserve to be protected in a manner inspired by the protection provided for intellectual productions.

20. Preservation of cultural heritage by the protection of cultural property has also been addressed by regional instruments. For example, the Organization of American States on 16 June 1976 adopted the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) 9/ in order to preserve the legacy of cultural heritage of the States parties. This Convention submits a broad definition of cultural property, including human skeletal remains and myriad archaeological materials existing prior to contact with European culture. It mandates States parties to undertake whatever measures they may consider effective to prevent and curb the unlawful exportation, importation and removal of cultural property, as well as those necessary for the return of such property to the State in which it belongs in the event of its removal.

B. National legislation

21. While the existing international standards mentioned above address States as subjects of international law, they do not directly regulate individuals or groups. However, national legislation and non-governmental cooperation between museums and indigenous peoples has grown over the last decade, and an examination of these developments may contribute to a better understanding of the issues involved.

22. A number of Governments have introduced national legislation to protect or restore the cultural property of the indigenous peoples living on their territories. Attention should be drawn to the initiatives taken in Australia, Canada, New Zealand and the United States. Certain legislation has been in place for a number of years. Mention can be made, for example, of the Antiquities Act of 1976, by which New Zealand provided the Maori Land Court jurisdiction over artefacts, including objects removed from graves. The Australian Minister of Aboriginal Affairs, as stated by the government representative during the Working Group's eighth session, has agreed to develop a strategy for the return to Australia of significant Aboriginal cultural material, particularly skeletal remains from overseas collections. Some sites of significant religious and cultural importance - the case of the return of Uluru (Ayer's Rock) in central Australia is the best-known example - have been returned to Aboriginal ownership. A number of Acts have been passed at the federal and state levels which protect sacred sites. Indeed, in June 1991, the Government of Australia refused to authorize mining on an area to the east of Darwin in the Northern Territory on the grounds that it was a sacred Aboriginal site.

23. In the United States the Native American Cultural Preservation Act has been in existence since 1987 and provides for the protection of Native American rights to the remains of their dead and to sacred artefacts, and for the creation of Native American cultural museums. Mention can also be made of the Native American Grave Protection and Repatriation Act enacted by the United States Congress in 1990. The Act acknowledges that numerous federal, state and private institutions hold the human remains of Native Americans and that Native Americans have an interest in acquiring these remains for the purpose of reinterment or other disposition consistent with their religious or cultural practices. The Act finds that the treatment of Native American human remains should be governed by respect for the human rights of Native people and for the values of scientific research and public education, respect for the human rights of Native American peoples being a paramount principle. The Act also requires that museums and other institutions holding the human remains of Native Americans compile an inventory.

C. Voluntary repatriation

24. Public and private museums and other institutions have also dealt with indigenous cultural property. The International Council of Museums (ICOM), a non-governmental organization, has articulated a set of standards that attempt to balance the cultural history of the country of origin with the integrity of the museum function. Thus, restitution of cultural property should occur only

in the presence of appropriate receiving institutions. Also, these institutions must be as accessible as possible within the country of origin and repatriation implies use of the objects only for cultural purposes. Finally, the country of origin must be able to provide adequate legal protection for the objects, according to international standards.

25. Further, individual museums have voluntarily repatriated cultural property. They have done so following a desire to strengthen their commitment to the UNESCO instruments regarding cultural property; many museums have reformulated their acquisition policies to discourage illicit trade in cultural property. Also worthy of note is the dialogue established in the United States between the government agencies regulating cultural property, museum officials, and the Native Americans themselves. In the last several years, museum professionals, anthropologists and archaeologists have increased debate over issues surrounding the care, handling and disposition of Native American materials. In 1990, the Panel for a National Dialogue on Museum/Native American Relations was founded, and began the formulation of a set of standards for the collection, display and use of human remains and other Native American cultural property. The Panel has stated that resolution of the issue of the voluntary repatriation of cultural property should be governed by respect for the human rights of Native peoples and for the values of scientific research and public education. In cases where a claim is made by a Native American group that has a cultural affiliation with remains or other materials, the Panel stipulates that the wishes of the group regarding the disposition of the materials must be followed.

IV. CONCLUSIONS AND RECOMMENDATIONS

26. Any further study which might be authorized by the Sub-Commission would require an examination of existing international instruments concerned with the protection and restitution of cultural property, as well as of relevant national legislation specifically focused on indigenous cultural property. There are also a number of court decisions and voluntary agreements between museums or other institutions and indigenous peoples which have led to the restitution of cultural property. A reference to these precedents would be helpful to a future study. The present working paper has also made reference to the work of UNESCO in this field and further elaboration of the question of indigenous cultural property might usefully be undertaken in cooperation with that organization. Information would also need to be gathered from all interested parties, including Governments, intergovernmental and indigenous organizations, and public and competent private institutions holding indigenous cultural property. Despite the positive developments of recent years leading to a dialogue between indigenous peoples and bodies holding their cultural property, there remains an information gap which a future study might help to bridge.

27. Non-governmental forms of cooperation have developed over the years and may result in new legal norms of restitution. A careful examination of the principles followed by non-governmental organizations, in particular the Museums Exchange Program started in 1978 by ICOM, seems to be of special importance for any resolution of indigenous peoples' requests for restitution of cultural property. Thereby, the study could benefit from the work done by ICOM's Executive Committee, in particular its 1979 study entitled "Study on the Principles, Conditions, and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritage". 10/

28. This working paper and any future study on the questions of the ownership and control of the cultural property of indigenous peoples, as stated earlier, would need to place emphasis on the protection of human rights of indigenous peoples, who have expressed the view that the restitution of cultural property, and particularly the return of human remains, funerary objects and sacred ceremonial and religious objects, is essential to the enjoyment of their human rights and fundamental freedoms. The protection and return of cultural property of religious, spiritual or cultural importance may be necessary to ensure their right to their own culture, to practise their own religion, and to preserve their group identity.

29. Finally, the author of this working paper recommends that the Sub-Commission on Prevention of Discrimination and Protection of Minorities consider authorizing further study of the question of ownership and control of the cultural property of indigenous peoples. In undertaking such a study, should it be approved by the Sub-Commission, the author reiterates her belief that it would be useful to seek the views and cooperation of Governments, indigenous peoples' organizations, intergovernmental bodies and national museums which have experience of this question.

Notes

1/ UNESCO Standard-setting Instruments, IV.A.4, (Paris, 1986).

2/ Ibid., IV.A.5.

3/ See: Lyndel Prott, "Cultural Rights as People's Rights". In: J. Crawford (ed.), The Rights of Peoples, Oxford, Clarendon Press, 1988, p. 100.

4/ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100. Encyclopedia Americana, vol. 17, New York, 1947, p. 369. Quoted in: Ludwig Engstler, Die Territoriale Bindung von Kulturgütern im Rahmen des Völkerrechts, Köln, 1964, p. 201.

5/ International Red Cross Handbook. 12th edition. Geneva, 1983.

6/ UNESCO, IV.A.4, op. cit.

7/ Ibid., IV.A.5.

8/ Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions. UNESCO/WIPO (Paris, 1985) (English/French/Spanish).

9/ The American Society of International Law, International Legal Materials, vol. XV, No. 6, Nov. 1976, pp. 1350-1355; Organization of American States, Proceeding of the General Assembly, Sixth Regular Session, Santiago de Chile, 4-18 June, 1976, vol. I, resolution 210 (VI-O/76).

10/ "Return and Restitution of Cultural Property" Museum, vol. 31, No. 1 (Special issue) (1979), pp. 62-66.

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